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No. _____

In the

Supreme Court of the United States

October Term 2000

DAVID KAMAKA KEANU and PAMELA LEE KEANU,

Petitioners,

vs.

UNITED STATES OF AMERICA, NORTEX CORPORATION, BANK OF HAWAII, STATE OF HAWAII DEPARTMENT OF TAXATION, STATE OF HAWAII DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, and THE CITY AND COUNTY OF HONOLULU,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the Due Process Clauses of the Fifth and Fourteenth Amendments require state statutes of limitations to be applied equally to mortgage foreclosure actions governed by state law when brought by the United States as they are applied to otherwise identical actions involving only private litigants, or is the federal government entitled to constitutionally preferential treatment when enforcing state law mortgage rights?

2. Was it the intent of Congress in enacting Section 2415 of Title 28 to place private litigants on an equal footing with the United States with respect to the application of state statutes of limitations in the enforcement of state law mortgage rights, or is the federal government entitled to statutorily preferential treatment when enforcing state law mortgage rights?

3. Even were no state statutes of limitations deemed to bar the United States from enforcing its state law mortgage rights, if the federal government delays bringing such suit for more than ten years following payment default, is such conduct so inequitably unreasonable as to no longer indefinitely toll the limitations period, especially in circumstances where that delay results in the borrowers' corresponding state law affirmative defenses and counterclaims becoming time-barred by applicable state limitations periods?

4. Are the centuries-old judge-made foreclosure laws in Hawaii, as adopted by the Hawaii district court for the enforcement by the United States of its state law mortgage rights, which result in an immediate six-week forced sale of the subject property substantially below actual fair market value, and a subsequent deficiency judgment, unless waived, being entered which ignores the existing value-diminishing "foreclosure blight," unconstitutional on their face as Due Process denials of the substantial property rights of Hawaii borrowers?

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I. JURISDICTIONAL STATEMENT

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit was entered on August 15, 2000, in a consolidated Appeal, reviewing two related decisions of the district court for the district of Hawaii, which (a) affirmed a final judgment by the district court filed on February 17, 1999, and which (b) affirmed a subsequent order by the district court denying Rule 60(b) relief filed on March 17, 1999.

The jurisdiction of the district court was based solely upon Section 1345 of Title 28 of the United States Code, the United States Government being a party to the state law foreclosure action.

This Court has jurisdiction to review, on a timely writ of certiorari, filed within ninety days of its entry, the Memorandum Opinion below, pursuant to Section 1254(1) of Title 28 of the United States Code and Supreme Court Rules 10, 13, and 30(1).

II. AUTHORITATIVE PROVISIONS

The principal governing provisions of law, set forth in the Appendix, are as follows:

The Fifth Amendment to the United States Constitution (due process clause), The Fourteenth Amendment to the United States Constitution (due process clause), Section 2415(a) of Title 28 (six-year federal money damage statute of limitations), Section 657-1 of the Hawaii Revised Statutes (six-year state contract and fraud statute of limitations), and Section 667-1 of the Hawaii Revised Statutes (foreclosure by action).

III. STATEMENT OF THE CASE

This is a suit brought by the Government in late 1995 to foreclosure on a Department of Agriculture, Rural Economic & Community Development, Farmers Home Administration, 1985 mortgage loan and for a deficiency judgment against two native Hawaiian borrowers, the Keanus, husband and wife, who purchased the subject property with the assistance of that Government loan program, and who made hundreds of thousands of dollars in extensive improvements to the property, only to discover that they had been defrauded by the Government, which dispute led to a series of protracted negotiations among the parties between 1985 and 1995, culminating in the action below.

By the time suit was filed by the Government, however, the Keanus' common law defenses and counterclaims had become time-barred by applicable state statutes of limitations, and the Government was thereafter able to press its foreclosure case without opposing defensive rights, which resulted in summary judgment being granted against them on April 16, 1998, and Judgment being entered on April 17, 1998.

On September 23, 1998, after a swift public auction, the district court adopting the State of Hawaii's foreclosure procedures, the Government moved to confirm the public sale to itself as sole bidder.

No junior lien holders even bothered to appear at the public auction or to contest confirmation.

On December 3, 1998, the Keanus immediately opposed confirmation, and filed a Rule 60(b) motion challenging the earlier summary judgment.

By order dated February 11, 1999, the district court not unexpectedly routinely confirmed the sale, and entered judgment against them on February 17, 1999.

And, by order dated March 17, 1999, the district court denied without a hearing the Keanus' Rule 60(b) motion.

On March 16, 1999, and on April 16, 1999, the Keanus filed timely notices of appeal, subsequently consolidated by their Ninth Circuit merits panel, which on August 15, 2000, affirmed by Memorandum Opinion the result in the district court.

Briefly, Petitioners David and Pamela Keanu, on or about January 28, 1985, with the financial assistance of a Farmers Home Administration ("FmHA") program, within the United States Department of Agriculture, seeking to assist, *inter alia*, native Hawaiians to acquire farming land, purchased a five-acre unit in a newly formed agricultural condominium subdivision located at Kaluanui on the Island of Oahu, for each of them a dream come true, borrowing for the purchase $200,000 from the FmHA, which was secured by a mortgage on their property, *via* printed, boilerplate loan documentation forms prepared by attorneys for the United States Government.

In so doing, David and Pamela Keanu joined at least thirty-three other native Hawaiian families as first-time property owners within that intended residential and agricultural project, forming what became known as the Kaluanui Farmers Association ("KFA"), planning to develop the land to grow prawns, bananas, and taro, as their ancestors did.

The land, however, at the time of purchase had no roads or utilities, but in making such loans to KFA members the FmHA administrators told David and

Pamela Keanu and the other purchasers-borrowers that the FmHA would prepare a "certified, approved plan" for, and would finance, that development.

The FmHA proceeded to hire Park Engineering to draft such a plan and Highway Construction Company to construct the roads and the utilities for the project, but despite the preparation of various preliminary plans, none to this day has ever been certified and approved.

Moreover, no formally approved water development plan ever materialized.

Despite numerous efforts to locate water resources on the land, no sufficient volume of water has to this day ever been developed or provided.

With no certified and formally approved development plan, no water development plan, and no water, as a matter of public record, the project could not be completed, which the Government has never denied, despite the fact that many owners, including the Keanus, had spent considerable sums, in anticipation thereof, attempting to improve their properties and themselves attempting to correct the Government's deficiencies – all to no avail.

David and Pamela Keanu, for instance, invested over $500,000 in their five-acre unit in the project – the $200,000 borrowed from FmHA, plus more than $300,000 of their own monies, representing with other borrowings which they also invested in the project their entire life's savings.

Consequently, most KFA members, led by David Keanu who became their President (the Government arguably singling him out later for retribution), were unable to and/or refused to make payments on their individual FmHA loans.

During that ten-year period, while seeking help from the FmHA administrators and their Congressional delegation to enable them to complete the development, secure water, and meanwhile rewrite their loan, David and Pamela Keanu considered their FmHA loan void and unenforceable and told FmHA administrators precisely that.

Despite the District Director of the FmHA in late 1989 having declared most KFA members' loans, including that of David and Pamela Keanu, to be in default and having declared an acceleration of the principal amounts due, suit was not brought against David and Pamela Keanu until late 1995, coincidentally well after the Hawaii state statute of limitations for both common law fraud and for breach of contract actions and related counterclaims had completely expired, and when the Keanus thought the Government had abandoned its mortgage claim due to its notorious performance failures, *supra*.

A state-law foreclosure complaint was filed against David and Pamela Keanu on October 13, 1995, in district court solely on the jurisdictional basis that the United States of America was a party.

Otherwise, state law applied throughout the proceedings.

The Government, in drafting its complaint filed October 13, 1995, its motion for summary judgment filed December 1, 1997, its proposed and adopted *verbatim* findings of fact and conclusions of law filed April 16, 1998, and its reply memorandum filed December 11, 1998, further supporting- sale confirmation, adroitly avoided informing the district court that the loan default complained of and the acceleration declared *had occurred more than ten years before* – which of course is well beyond the applicable Hawaii State six-year statute of limitations

for loan default suits and for mortgage foreclosure actions were state law to otherwise apply.

Apparently the Government thought it prudent not to so inform the district court, and the Keanus were thus barred at the outset from sustaining a defense, as the Government's mortgage also recited a boilerplate "waiver of local laws" signed by the Keanus: "We agree you will not be bound by any present or future local laws: . . . (3) Prescribing a statute of limitations."

Consequently, the district court at the time the foreclosure summary judgment had been granted had before it what appeared to be a defenseless foreclosure money-judgment suit.

Summary judgment was entered April 16, 1998. And a Rule 54(b) Judgment was entered the very next day.

The property was then hastily sold at public auction to the Government, credit bidding, for the unilateral, single-bidder price of $310,700.

Prior to sale confirmation, the Keanus retained replacement counsel, who immediately, for reasons set forth in the *Legal Argument* section, *infra*, *inter alia*, vigorously opposed confirmation -- filing simultaneously a Rule 60(b) motion attacking the original summary judgment, requesting but being denied a hearing thereon.

The district court on February 11, 1999, confirmed the sale, but confirmed the sale without a deficiency judgment, for when faced with unexpected opposition, the Government abruptly withdrew its request for a deficiency judgment in the very middle of the confirmation hearing, which deficiency judgment would have been in excess of $200,000 -- a last-minute maneuver, which the Government however did

not offer to do in the foreclosure actions of most of the other native Hawaiians, most appearing without counsel, adding to the magnitude of the Government's misconduct -- which last-minute offer in the Keanus' case the district court termed a "major bomb shell" in their case, although of no more than token redress for the Keanus who themselves had lost many times more than what was supposedly being generously forgiven due to the Government's misconduct, and on February 17, 1999, the district court entered final judgment.

The Keanus' only hope now for achieving justice is in the hands of this Court.

IV. LEGAL ARGUMENT

1. Were State Law Alone Controlling, The District Court Would Have Lacked Subject Matter Enforcement Jurisdiction As The Underlying Mortgage As A Matter Of Hawaii State Law Was Clearly Unenforceable As Against Public Policy.

The Government's claims are purely state law breach of contract claims, and state law therefore would generally govern and determine, for example, the applicable statute of limitations in district courts; *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 65 (1938); *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 110 (1945). See, *e.g.*, *GE Medical Systems v. Silverman*, 1998 WL 54361, *2 (E.D. Pa. 1998) (federal court adjudicating statute of limitations issues must apply law of forum state).

Clearly, as a matter of Hawaii law, enforcement of the underlying mortgage by at least private litigants would have been absolutely time-barred by that State's six-year contract statute of limitations, Section 657-1 of the Hawaii Revised Statutes.

And, while it is true, as the United States may argue, that three decades ago the Hawaii Supreme Court held in *Mauian Hotel, Inc. v. Maui Pineapple Co., Ltd.*, 52 Haw. 563, 569, 481 P.2d 310 (1971), that the statute of limitations in Hawaii is "a personal defense" that "a person may waive," the FmHA's blanket boilerplate *take-it-or-leave-it* waiver clause, *supra*, is a textbook example of the type of *contract of adhesion* which the Hawaii appellate courts have always refused to enforce.

"In contracts of adhesion," the Hawaii Supreme Court, for example, explained in *Leong v. Kaiser Foundation Hospitals*, 71 Haw. 240, 248, 788 P.2d 164 (1990), courts are concerned with terms which are oppressive to the weaker party and which serve to limit the obligations and liability of the stronger party."

What could be more evident here, as the Government sought with its small print, boilerplate waiver to allow it to sue for breach of contract whenever it chose to, while in effect restricting the ability of native Hawaiian borrowers to correspondingly sue for breach of contract and for fraud to the state statutory limitations period of six years – and what transpired here was that the Government adroitly waited more than ten years to sue, well after the borrowers were theoretically out-of-time in which to defend themselves.

In *City and County of Honolulu v. Midkiff*, 62 Haw. 411, 418-419, 616 P.2d 213 (1980), the Hawaii Supreme Court made such adhesion clauses void and unenforceable:

> [T]he trial court must hold a hearing on the issue of unconscionability of the . . . clause. The hearings must be a 'reasonable opportunity to present evidence as to (the clause's) commercial setting, purpose and effect to aid the court in making the determination.'

> U.C.C. 2-302(2). The test applicable in determining unconscionability is 'whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.' Id., Comment 1; Earl M. Jorgensen Company v. Mark Construction, Inc., 56 Haw. 466, 474-75, 540 P.2d 978, 983-84 (1975).
>
> We find the words of the Court of Appeals for the District of Columbia Circuit, expanding on the test, to be pertinent to the instant case:
>
> 'Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party . . . .'
>
> Williams v. Walker-Thomas Furniture Company, 350 F.2d 445, D.C. Cir. 1965) (footnote omitted).

Although there are no appellate cases in Hawaii directly addressing the enforceability of a boilerplate statute of limitations waiver clause in a loan agreement as contrary to public policy, based upon the Hawaii Supreme Court's prior opinions, *supra*, with respect to adhesion and unconscionability, it appears likely that Hawaii would take a similar view on that issue as the district court in the District of Columbia, *supra*, did a few years earlier in *Munter v. Lankford*, 127 F. Supp. 630, 631-632 (D.C. Cir. 1955):

Admittedly, the defense of the statute of limitations may be waived after the cause of action arises, or perhaps even prior to that time, but subsequently to the execution of the instrument on which suit is brought. Whether such a waiver is valid if contained in the contract itself involves an entirely different principle. The question is one of novel impression in this jurisdiction.

The States are divided on this point, although the majority rule is that a waiver of the statute of limitations contained in the original instrument is contrary to public policy and, therefore, void and unenforceable.

Thus, the majority rule prevails in Massachusetts and New York. In National Bond & Investment Co. v. Flaiger, 322 Mass. 431, 434, 77 N.E.2d 772, 773, 1 A.L.R.2d 1442, Lummus, J., stated:

'In Williston, Contracts (Rev.Ed. 1936) Section 183, upon consideration of the authorities in many jurisdictions, it is laid down as the 'better view,' and the rule of a majority of jurisdictions, that an agreement contained in the original obligation never to set up the statute of limitations violates the public policy of the statute, and is invalid. We think that the rule represents the law of this Commonwealth, just as it does that of New York and many other States.'

This doctrine has also been adopted in Mississippi. Crane v. French, 38 Miss.

503, 532, contains an illuminating discussion of this subject:

'* * * it appears clearly to be an agreement in violation of public policy; that policy which requires suits to be brought in due season, and discourages stale demands, as calculated to promote litigation, and to prejudice the just rights of parties. This policy stands upon the same reason of the public good, as the laws in relation to usury . . . .

This is likewise the rule in Arizona. Some challenging observations are found in Forbach v. Steinfeld, 34 Ariz. 519, 526, 273 P. 6, 9:

'Statutes of limitation, exemption laws, the right of redemption from a mortgage, and all similar provisions are meant for the protection of the debtor as against the creditor. They are a part of the public policy of modern legislation. The wise man of old has well said, 'The borrower is servant to the lender,' and the debtor, when he applies to the creditor for favors, is always under a certain moral duress. If the latter has the right to demand a waiver of statutory rights, he will almost certainly do it, and the former generally is in no position to protect himself. For this reason, the law, in order to give the debtor effectively the protection which the public policy of the state says is his privilege, must deny him the right of binding himself to surrender it.'

This is also true in Louisiana. Segonod v. Landry, 1 Rob. 335, 336, contains the following comments:

> 'If at the time of making a contract, parties were permitted to renounce beforehand future prescriptions, these renunciations would be always stipulated, would become a standing and customary clause in every contract, and thus the beneficial effects to society supposed to flow from prescriptions would be defeated.'
>
> The basis of the prevailing doctrine is that statutes of limitations are based on public policy. They are statutes of repose and are intended to prevent the revival and enforcement of stale demands against which it may be difficult to defend, because of lapse of time, fading of memory, and possible loss of documents.

2. The District Court Lacked Subject Matter Enforcement Jurisdiction As A Matter Of Controlling Federal Law.

The Court of Appeals below, first citing its prior decision in *United States v. Dos Cabezas Corp.*, 995 F.2d 1486 (9th Cir. 1993), which relied upon the 1939 decision of this Court in *United States v. Summerlin*, 310 U.S. 414, 416 (1939), summarily concluded that the Government is not subject to *any* State statute of limitations period whatsoever unless a federal statute imposes or adopts one, and next concluded, citing its earlier decision in *United States v. Thornburg*, 82 F.3d 886 (1996), that the federal six-year money judgment statute of limitations does not apply to mortgage foreclosures.

It is respectfully suggested that both positions are invalid where, as here, the underlying mortgage

would have been void had private litigants attempted its enforcement.

As a starting point, this Court has already held that Congressional intent in enacting Section 2415 was to place actions by the United States on an equal footing with those brought by private litigants, *Crown Coat Front Co. v. United States*, 386 U.S. 503, 521-522 (1967).

The Ninth Circuit Court of Appeals in *Thornburg* took a misstep, it is submitted, when it later followed *Farmers Home Administration v. Muirhead*, 42 F.3d 964 (5th Cir.), *cert. denied*, 133 L.Ed 2d 16 (1995), 82 F.3d at 894, and refused to give this Court's holding in *Crown*, *supra*, greater weight in the mortgage foreclosure context, concluding instead that "Congress has left no gap in the law concerning the right of the United States to foreclose without being subject to a limitation period," with "no matter left unaddressed by federal law that must be supplemented by a state law of decision," 42 F.3d at 966.

First, the complaint in this action by express language requests a judicial declaration that the underlying monetary debt is in default and only thereafter, once that is decided, for permission to go against the mortgage security as an elected collection remedy; and that is precisely how the district court's "finding of fact no. 1," drafted by the Government's attorneys, itself reads: "This is a civil action . . . on a promissory note, secured by a mortgage dated January 28, 1985."

Moreover, the district court's "finding of fact no. 7," goes on to recite: "Pursuant to the terms of the Note and Mortgage, the entire remaining principal and interest thereon are due and payable."

Being essentially a contract action, and not an *in rem* action by its own language, the Government's suit, whatever collection remedy the Government might

have subsequently elected or waived, is for a *money judgment*, with or without, for instance, any added "deficiency" judgment.

For, in the event of a successful public foreclosure sale, the Government is not permitted to take the property *in rem* -- notwithstanding if, with its allowed credit bid, it is the successful bidder at the auction sale, for in that event it has a completely different legal standing and a completely different legal capacity as *the purchaser* – and instead *gets the money*, as in any other routine collection action subject to Section 2415(a), so as to secure a monetary recovery for itself as mortgagee, as expressly stated in the mortgage itself, as the intended "use of foreclosure proceeds" with or without a subsequent deficiency, waived or not.

That being the case, contrary to anything to the contrary read into *Thornburg*, *supra*, there is indeed room for "a state rule of decision" – to place the Government "on an equal footing with private litigants" -- to supplement Section 2415(a), which measures the limitations period from when the "*the right of action accrues*" – since each installment-payment default would trigger the running of the statute of limitations as to at least that monetary payment even if acceleration were not elected (which is a precondition of course for any mortgage foreclosure action), as explained, for instance, in *Dos Cabezas*, *supra*, 995 F.2d at 1490.

Since a default occurs, and a "right of action accrues," to use the exact terminology found in Section 2415(a), whenever a monthly loan payment is missed -- with or without acceleration as to the balance of the debt -- that part of the loan in default triggers the running of a federal money-judgment statute of limitations as to each such monthly payment in default, for identical reasons.

Section 2415(a) therefore clearly applies here for, as to at least four years worth of payments in

dispute – which are in default according to the Government's proffered calculations – that part of the debt at least had at least long expired, since the Government did not bring an action on the promissory note until ten years after those defaults first accrued, factoring in a federal statute of limitations on monetary debts of six years pursuant to Section 2415(a).

This Petition provides this Court with a urgently needed opportunity to reexamine the breadth of its 1939 decision in *Summerlin*, *supra*, in a truly equity-laden state law mortgage foreclosure context, applying, for instance, for the first time, if it chooses, a Due Process or an Equal Protection analysis to the undisputed facts here.

3. It Was An Abuse Of Discretion For The Court Of Appeals To Affirm, In Favor Of The Government, A District Court's Enforcement Of A State Law Mortgage Foreclosure Suit, Filed More Than Ten Years After An Alleged Loan Default, In The Circumstances Of This Case.

The Government concedes that it waited nearly five years – from January 28, 1985, when the subject loan was made, to October 16, 1989, when it issued its loan acceleration notice to the Keanus – before declaring a default, even though the Keanus refused from the very outset, following the Government's failure to perform its promises, to honor the debt, and waited five additional years before filing suit.

While it is true that Section 2415(a) provides for a six-year federal statute of limitations barring complaints on actions founded on money damages brought by the United States, and while it is generally held that that statute of limitations only begins to run once the debt is accelerated, it is also equally true as a matter of federal law, as acknowledged by the

Government's own cited judicial precedent below, that "the government must make its demand within a reasonable time," *United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1491 (9th Cir. 1992) (citing *United States v. Gottlieb*, 948 F.2d 1128, 1130-1131 (9th Cir. 1991)), otherwise federal courts would be allowing "unfettered discretion on the part of the government to toll the statute of limitations indefinitely by delaying its demand," 948 F.2d at 1130.

In *Gottlieb*, *supra*, while another merits panel of the same Court of Appeals as that below understandably found a two-week delay "reasonable," 948 F.2d at 1131, in *Dos Cabezas*, *supra*, another merits panel of the Ninth Circuit was openly troubled by a fifteen-month day, but concluded reluctantly that it was under the circumstances "not excessive," 995 F.2d at 1491.

Here, however, notwithstanding an egregious and unprecedented ten-year delay, in its Memorandum Opinion Keanus' reviewing merits panel only footnoted cryptically, without further explanation, that "the Keanus have failed to demonstrate the doctrine of 'inordinate delay' applies here or that equitable relief would be appropriate."

It would be difficult, it is submitted, to envision a more compelling case for equitable relief, than that found in the undisputed circumstances here, where in effect the Government strategically outwaited the Keanus before filing suit until the Keanus were time-barred – as ordinary private litigants -- from prosecuting their contract and fraud defenses and counterclaims against the Government's related state law contract claims.

As the Court of Appeals for the District of Columbia understandably explained in *Nyhus v. Travel Management Corporation*, 466 F.2d 440, 452 (D.C. Cir. 1972): "To be sure, a party is not at liberty to stave off operation of the statute [of limitations] inordinately by

failing to make demand; when statutorily unstipulated, the time for demand is ordinarily a reasonable time."

Paradoxically, the Ninth Circuit's "reasonable time" view, as espoused in every case decided by merits panels of the Ninth Circuit but in the Keanus' case, has now been adopted in all circuits; see, *e.g.*, *United States v. Gordon*, 1994 WL 514533, *6 (S.D.N.Y. 1994) ("the Government may not toll the statute of limitations indefinitely by failing to make such a demand").

Clearly, the ten-year delay that occurred here was both excessive and unreasonable – and unprecedented in the case law.

Thus, the Keanus, who, consequently estopped from prosecuting their state statute of limitations as a defense, where at the same time precluded from prosecuting their state common law defenses and counterclaims – providing a windfall for the Government in their mortgage foreclosure case.

If that was not the Government's true intent, it certainly was the result which the Government obtained.

Furthermore, It should make no difference whether or not Section 2415(a) is thought to apply to foreclosure actions, for the Government concedes, as it must, that Section 2415(a) does surely apply to money judgments – which collectively would be part and parcel of any deficiency judgment -- and presumably to also defaults in monthly payments, as explained above, whether the loan balance is accelerated or not, quoting from *Dos Cabezas*, *supra*, 995 F.2d at 1490: "[T]he government's cause of action for payments already in default at the time of acceleration accrued on the date of each separate default, when the defendants became obligated to make those payments."

Moreover, this Court has long recognized the importance of upholding statute of limitations' defenses, as this Court took time to fully explain in *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 428 (1965), its reasoning subsequently cited approvingly, coincidentally, by the Hawaii Supreme Court in *Pacific Concrete Federal Credit Union v. Kauanoe*, 62 Haw. 334, 343, 614 P.2d 936 (1980), in a similar consumer-protection oriented, mortgage foreclosure context as here:

> Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." Order of Railroad Telegraphers v. Railway Express Agency, Inc. 321 US 342, 348-349, 88 L ed 788, 792, 64 S Ct 582. Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights.

4. The Centuries-Old Judge-Made Foreclosure Laws In Hawaii, Which The District Court Applied Below, On Their Face Deprive Borrowers Of Substantial Due Process Property Rights, Subjecting Their Real Property To Indiscriminant Below Market Forced Sales And To Artificially Bloated Deficiency Judgments.

Not since the Great Depression, when many States enacted foreclosure moratorium laws, later held to be constitutional by this Court, *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945), have there been so many foreclosures and related bankruptcy filings, especially in Hawaii, whose economy has trailed that of the rest of the Country.

Indeed, the situation in Hawaii in most respects is much worse today than the foreclosure emergency that lead to the foreclosure moratorium laws on the U.S. Mainland in the 1930s.

Nevertheless, in Hawaii there has been a virtual absence of leadership from the State Legislature or the State Judiciary to cope with this growing crisis, and nothing whatsoever has been done to alleviate what has truly become a financial catastrophe and a wholesale Due Process slaughter for many State residents due to some of the most archaic and unfair state foreclosure laws remaining in this Nation's history, which continue to subject that State's citizens, and those citizens of other States buying real property in Hawaii in interstate commerce, to extreme and unfair forfeitures at hasty public auction sales.

Not only, for instance, are foreclosure auctions economically unrealistic in such extreme times – the irrational marketing time and bidding requirements, customarily compressed within six weeks, reducing the number of potential buyers, thus artificially deflating true market prices – but the "foreclosure blight", as it

were, itself additionally greatly diminishing bid prices by what is generally known to be between fifty to seventy-five percent of actual market value, allowing lenders in most instances to "credit" bid with contrived purchase prices, thus securing potentially *a double recovery* -- by adding to their acquisition of the property at below market rates a so-called *deficiency judgment* – in Hawaii determined mechanically by subtracting the bid price from what is owed and the costs of sale.

Such predatory judicial policies – judge-made law in Hawaii – which the district court there has adopted -- are not practiced everywhere; in California, for instance, after an auction sale, *another hearing is held* after confirmation to determine the true market price of the property, factoring in the then existing "foreclosure blight" – the lender awarded in appropriate cases many times no deficiency judgment at all, even though the auction price is frequently but a fraction of the remaining mortgage balance.

The unfairness of such a six-week, forced, non-real-estate-professionally-brokered, non-marketed, auction sale, and such ancient foreclosure practices as artificially bloated wooden deficiency calculations, inflicted in Hawaii upon both Hawaii residents and nonresidents alike, can clearly be seen here, where the Keanus' property attracted zero attention at the scant-advertised public auction sale, the Government's exaggerated claims and the draconian cash bidding and closing requirements effectively and predictably scaring away potential bidders, if any, and the Government being thus able to bid at will as low or as high as it desired to.

Other state legislatures and state judiciaries, in the face of such unfairness, have acted to protect borrowers through, for instance, with respect to deficiency calculations, the statutory enactment or judicial recognition of "fair-value" foreclosure procedures so as to avoid such forfeitures and double

recoveries for either unscrupulous or windfall-accepting lenders.

This has heretofore been done by statute, as in California, for instance, as explained in the decision of the Supreme Court of California in *Roseleaf Corp. v. Chierighino*, 59 Cal.2d 35, 378 P.2d 97, 27 Cal.Rptr. 873 (1963) (*en banc*), or by judicial decree, as in New Jersey more than a half century ago, for instance, whose Court of Chancery, with laudable foresight, saw the issue as one of basic equity, as explained in *Investors Mortgage & Realty Co. v. Preakness Hills Realty Co.*, 133 N.J. Eq. 258, 31 A.2d 830 (1943).

In the absence of such state action in Hawaii, it is respectfully submitted that close constitutional scrutiny of this important and neglected area of American law by this Court is long overdue, especially considering the fact that for most Americans home ownership is not only central to the American dream, but also in most instances represents the largest and most important financial asset that they and their families will ever own.

In Hawaii, the foreclosure laws are essentially judge-made.

The procedures utilized by state courts are patterned after centuries-old practices providing for the appointment of a commissioner, usually of questionable qualifications, advertising the property in a small local newspaper ad once for three consecutive weeks, holding a public auction on the steps of the courthouse immediately thereafter, requiring qualified bidders to post ten percent down in cash prior to bidding, with their full cash balance due no more than thirty-five days following an immediate confirmation hearing where the bidding may be reopened only upon receipt of a bid at least five percent higher than the winning bid accepted at the earlier public auction.

"Foreclosure by action," as the procedures are termed, is authorized by a cryptic forty-nine-word statutory provision, basically unchanged since 1859, known as Section 667-1 of the Hawaii Revised Statutes.

This Court recently in *Associates Commercial Corporation v. Rash*, 520 U.S. 953 (1997), in a dispute concerning the proper application of Section 506(a) of the Bankruptcy Code, implicitly recognized that foreclosure valuations do not in fact represent true market value, although in that context no Due Process analysis was apparently presented to, nor considered by, the Court.

Judging from the manner in which lower federal courts have subsequently sought to increasingly limit this Court's recent holding in *Rash*, *see e.g.*, *In re Donley*, 217 B.R. 1004, 1006-1007 (Bk. S.D. Ohio 1998), and *In re White*, 231 B.R. 551, 557-558 (Bk. D. Vt. 1999), a more broader and fundamental examination of the constitutionality of foreclosure valuations in and of themselves, as advocated here, would prove helpful in other areas of federal law as well, particularly in the bankruptcy field where the unfairness of foreclosure valuations has been causing increasingly confusion, bickering, and consternation among lenders and borrowers alike.

Although argued below before the district court, and again before the Keanus' Ninth Circuit merits panel, the constitutionality of Hawaii's judge-made foreclosure laws was neither considered by nor addressed in the written decisions of either court.

V. CONCLUSION

For all of the above reasons, Petitioners pray that this Court will reverse the Court of Appeals, and remand this case with instructions either to dismiss the Government's complaint altogether as time-barred as a matter of law, or for a trial on the merits, permitting Petitioners to prosecute their affirmative defenses and counterclaims if the Government is allowed to continue to prosecute its state law mortgage claims, and declaring the Hawaii judge-made foreclosure laws adopted by the district court unconstitutional on their face.

Most respectfully,

/s/ Gary Victor Dubin

GARY VICTOR DUBIN
Counsel for Petitioners

Honolulu, Hawaii
November 13, 2000

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APPENDIX

1. Fifth Amendment To The United States Constitution

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

2. Fourteenth Amendment To The United States Constitution

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Section 2415(a) Of Title 28 Of The United States Code

[E]very action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues . . . .

4. Section 657-1 Of The Hawaii Revised Statutes

The following actions shall be commenced within six years next after the cause of action accrued, and not after: (1) actions for the recovery of any debt founded upon any contract, obligation, or liability . . . .

5. Section 667-12 Of The Hawaii Revised Statutes

The circuit court may assess the amount due upon a mortgage, whether of real or personal property, without the intervention of a jury, and shall render judgment for the amount awarded, and the foreclosure of the mortgage. Execution may be issued on the judgment, as ordered by the court.

6. "Memorandum" Opinion Of The Court Of Appeals For The Ninth Circuit, Case Nos. 99-15513 & 99-15798, filed 8/15/00

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States of America, Plaintiff-Appellee, v. David Kamaka Keanu, et al., Defendants-Appellants.	Nos. 99-15513,99-15798 D.C. No. CV-95-00850HG MEMORANDUM[1] ***Filed Aug 15 2000***

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Argued and Submitted August 1, 2000

Before: PREGERSON, HAWKINS, and McKEOWN, Circuit Judges.

David K. and Pamela Lee Keanu ("The Keanus") appeal from (1) the district court's confirmation of the foreclosure sale of their property subject to a federal mortgage, and (2) the district court's denial of their Rule 60(b) motion to vacate the district court's order granting the government's motion for summary judgment and for an interlocutory decree of foreclosure.[2] We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

The Keanus maintain that the government's action is time-barred, either under Hawaii state law or under 28 U.S.C. § 2415(a), the federal statute of limitations for actions brought by the United States. A ruling on the appropriate statute of limitations is a question of law reviewed de novo. Burrey v. Pacific Gas and Elec. Co., 159 F.3d 388, 396 (9th Cir. 1998). State law statutes of limitation on foreclosure actions do not apply to actions brought by the United States. See United States v. Thornburg, 82 F.3d 886, 894 (9th Cir. 1996); see also Bresson v. Commissioner, 213 F.3d 1173, 1177 (9th Cir. 2000) (discussing Thornburg). Nor does section 2415(a) apply to actions brought by the federal government to foreclose on a

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[2] In response to the government's query in its brief, the district court had jurisdiction to rule on the Rule 60(b) motion. See Stone v. INS, 514 U.S. 386, 401 (1995); see also Stein v. Wood, 127 F.3d 1187, 1189 (9th Cir. 1997).

mortgage. Thornburg, 82 F.3d at 894.[3] Rather, "[t]he foreclosure action itself was not subject to any limitations period." United States v. Dos Cabezas Corp., 995 F.2d 1486, 1490 (9th Cir. 1993).[4]

The Keanus raise several other issues on appeal, which we address briefly. First, the district court did not abuse its discretion in not holding an evidentiary hearing on the Rule 60(b) motion. Second, the Keanus failed to object to the government's evidence on the amount of the outstanding balance, see United States v. Western Elec. Co., 337 F.2d 568, 575 n.19 (9th Cir. 1964), and, in any event, admission of such evidence was harmless in light of the other evidence. Third, the Keanus have failed to demonstrate that the foreclosure procedures employed here were "highly irregular" such that potential bidders were scared away. Finally, the Keanus have failed to demonstrate that they suffered a violation of their due process rights as a result of the procedures, especially in light of the government's withdrawal of its request for a deficiency judgment.

AFFIRMED.

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[3] Section 2415(a0 applies to actions for deficiency judgments, but the government's withdrawal of its request for a deficiency judgment renders that section inapplicable here.

[4] The Keanus have failed to demonstrate that the doctrine of "inordinate delay" applies here or that equitable relief would be appropriate.

7. Order Approving Report Of Commissioner, Confirming Commissioner's Sale At Public Auction, And Directing Distribution Of Proceeds, Civil No. 95-00850 HG, filed 2/11/99.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

United States of America,	)	Civil No. 95-00859 HG
	)	
Plaintiff,	)	Order Approving
vs.	)	Report Of
	)	Commissioner,
David Kamaka Keanu, et al.,	)	Confirming Commissioner's
	)	Sale At Public
Defendants.	)	Auction, And
	)	Directing
	)	Distribution
	)	Of Proceeds
	)	
	)	***Filed Feb 11 1999***

Hearing Date: December 21, 1998

ORDER APPROVING REPORT OF COMMISSIONER, CONFIRMING COMMISSIONER'S SALE AT PUBLIC AUCTION, AND DIRECTING DISTRIBUTION OF PROCEEDS

The motion for confirmation of sale filed herein by Plaintiff United States of America came on for hearing before the Honorable Helen Gillmor, United States District Judge, in her courtroom, on December 21, 1998. Assistant United States Attorney Tracy Hino appeared for plaintiff; H.K. Br[illegible] Keppeler and Gary Victor Dubin appeared for defendants David Kamaka Keanu and Pamela Lee Keanu; Winston Wong, Deputy

Corporation Counsel appeared for defendant City and County of Honolulu; and Roger Lerud, commissioner, also appeared.

After considering the Commissioner's Report filed herein and being fully advised in the premises, and good cause appearing therefor, the Court makes the following findings, to wit:

1. That Roger Lerud, the Commissioner appointed by the Findings of Fact, Conclusions of Law and Order Granting Summary Judgment and Interlocutory Decree of Foreclosure (filed herein on April 16, 1998), to sell the mortgaged property referred to in said Order and described in the Complaint filed in this case and hereinafter described, did make the report of the proceedings had under the said Order and the account of expenses incurred in connection therewith in the report, that the sale as reported by said Commissioner was legally made and fairly conducted; that the Court carefully considered the exceptions and objections made by defendants David Kamaka Keanu and Pamela Lee Keanu to said Commissioner's Report of the sale and/or to the confirmation of said sale; that said Order has, in all respects, been complied with by said Commissioner; and that the sale of subject property to Plaintiff United States of America for the sum of $310,700.00, by way of offset, is proper and said price is fair and equitable and as high as any that can be obtained under the circumstances.

2. That the property foreclosed upon herein is described in Exhibit "A" attached hereto [omitted] and made a part hereof.

3. That the amounts due Plaintiff United States of America on the note as of March 20, 1998 (the date of the summary judgment hearing), are as follows: original loan amount $200,000.00, with accrued interest on the loan principal of $281,504.11, protective advances of $12,272.05, with accrued interest on the protective advances of $4,094.02, for a total of

$497,870.18, with interest continuing to accrue at the rate of $58.9041 per day.

4. That a fee of $3,420.00 is a reasonable fee for the Commissioner for his services as Commissioner; that the Commissioner incurred expenses of sale in the total amount of $1,052.16 for legal notice publication costs and other costs as set forth in the Commissioner's Report filed herein.

5. That Plaintiff United States of America has withdrawn its request for a deficiency judgment against Defendants David Kamaka Keanu and Pamela Lee Keanu.

GOOD CAUSE APPEARING THEREFOR, it is hereby ORDERED, ADJUDGED AND DECREED:

1. That the Commissioner's Report filed herein be and the same is hereby in all respects ratified, approved and confirmed.

2. That in accordance with the Findings of Fact, Conclusions of Law and Order Granting Summary Judgment and Interlocutory Decree of Foreclosure entered herein on April 16, 1998, the sale of the mortgaged property to Plaintiff United States of America at the offered price of $310,700.00, by way of offset, be and the same is hereby ratified, approved and confirmed, and that said Commissioner is hereby ordered and directed to make good and sufficient conveyance thereto to plaintiff United States of America.

3. That the Commissioner be and hereby is allowed the sum of $1,052.16 for taxes and expenses as Commissioner and a further sum of $3,420.00 for services as Commissioner, for a total amount of $4,472.16.

4. That out of the sum of $310,700.00 received from the property sold, plus any rentals received, the Commissioner shall pay:

(a) To himself, as Commissioner, the sum of $1,052.16 as reimbursement for taxes and expenses of sale;

(b) To himself, as Commissioner, the sum of $3,420.00 as the fee for services as Commissioner;

(c) To the City and County for any unpaid real property taxes;

(d) To Plaintiff United States of America, the sum of $502.50 for court costs.

5. Upon the Commissioner making the aforesaid conveyance and distributions, and the filing herein of the distribution statement and account conforming herewith, said Commissioner shall be discharged from further duties and responsibilities as Commissioner.

6. That the defendants herein .and all parties hereto and all persons claiming by, through or under said defendants and parties, shall be and are hereby forever barred of and from any and all right, title and interest and claims at law or in equity to the mortgaged property hereinbefore described, and every part thereof.

7. That upon delivery to Plaintiff United States of America of the conveyance herein authorized and directed, that Plaintiff United States of America shall be entitled to immediate and exclusive possession of the property hereinbefore described. The Court hereby reserves jurisdiction to enter such orders as may be necessary or appropriate to assist Plaintiff United States of America to gain such possession.

8. That Plaintiff United States of America shall not have and recover from Defendants David Kamaka Keanu and Pamela Lee Keanu any deficiency resulting from the aforesaid sale.

9. That this order is entered as a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure as there is no just reason for delay.

DATED: Honolulu, Hawaii, February 10, 1999.

/s/ Helen Gillmor

HELEN C. GILLMOR
United States District Court Judge

8. Order Denying Keanu Defendants' Rule 60(b) Motion To Set Aside And To Vacate (1) "Findings Of Fact And Conclusions Of Law And Order Granting Motion For Summary Judgment And For Interlocutory Decree Of Foreclosure," Filed April 16, 1998 And (2) "Judgment" Filed April 17 1998, Civil No. 95-00850 HG, filed 3/17/99

United States of America, Plaintiff, vs. David Kamaka Keanu, et al., Defendants.	Civil No. 95-00859 HG ***Filed Mar 17 1999***

ORDER DENYING KEANU DEFENDANTS' RULE 60(B) MOTION TO SET ASIDE AND TO VACATE (1) "FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND FOR INTERLOCUTORY DECREE OF FORECLOSURE," FILED APRIL 16, 1998 AND (2) "JUDGMENT" FILED APRIL 17 1998, CIVIL NO. 95-00850 HG, FILED 3/17/99

Plaintiff United States brought suit to foreclose the mortgage held on Defendants' property. A motion for summary judgment and for interlocutory decree of foreclosure was filed by the government on December 1, 1997. At the hearing on January 5, 1998, the Keanu Defendants (the mortgagors) appeared through their counsel and did not object to summary judgment or foreclosure. On April 16, 1998 the Court entered an Order for Summary Judgment and an Interlocutory Decree of Foreclosure in the instant case. The Court appointed a commissioner and the property in question proceeded to be sold at auction. Plaintiff was the successful bidder.

The Keanu Defendants now move for reconsideration pursuant to Federal Rules of Civil procedure Rule 60(b). They argue that summary judgment should be set aside as (1) the applicable statute of limitations period prevented the entry of summary judgment and (2) because the Keanu Defendants wrongfully believed that they were barred from raising any applicable defenses or counterclaims. The Court DENIES the motion for reconsideration

PROCEDURAL BACKGROUND

Pursuant to the unopposed motion of the United States, this Court entered Findings of Fact, Conclusions of Law and Order Granting Motion For Summary Judgment and For Interlocutory Decree of Foreclosure on April 16, 1998. The Court appointed a Commissioner by that Order who prepared and sold at auction the property at issue. On September 23, 1998, the United States filed a Motion for Confirmation of Sale and to Approve Commissioner's Report, for Distribution of Proceeds, and for Deficiency Judgment (motion for confirmation).

On December 3, 1998, the Keanu Defendants filed a Memorandum in Opposition to the motion for

confirmation to which the United States filed a Reply Memorandum on December 11, 1998. On December 21, 1998, the matter came for hearing before the Court. At the hearing, the Keanu Defendants presented the Court with copies of a motion, filed at 8:25 p.m. on December 20, 1998, entitled Keanu Defendants' Rule 60(b) Motion to Set Aside and to Vacate (1) "Findings of Fact and Conclusions of Law and Order Granting Motion For Summary Judgment and For Interlocutory Decree of Foreclosure," Filed April 16, 1998 and (2) "Judgment" Filed April 17, 1998 (motion for reconsideration). The Keanu Defendants argued that the Court should delay confirmation of the sale pending resolution of the Keanu Defendants' motion for reconsideration. After reviewing the papers and hearing argument, the Court granted the United States' motion for confirmation of the sale.

In response to the Keanu Defendants' motion for reconsideration, the United States filed a Memorandum in Opposition to the Motion to Set Aside and to Vacate (1) "Findings of Fact and Conclusions of Law and Order Granting Motion For Summary Judgment and For Interlocutory Decree of Foreclosure," Filed April 16, 1998 and (2) "Judgment" Filed April 17, 1998. The Keanu Defendants filed their Reply Memorandum on January 29, 1999

FACTUAL BACKGROUND

On January 28, 1985, the Keanu Defendants executed the Promissory Note and Mortgage relevant to this case. The Farmers Home Administration (FmHA) made thirty-four separate farm ownership loans to allow individuals to purchase farm condominium units from Kaluanui Acres, a fee simple

condominium farm project located near Punaluu.[5] The project soon ran into problems with the sufficiency of the water supply for aquaculture. The Keanu Defendants elected to stop making payments toward their promissory note and mortgage. (See Pl.'s Memo. in Opp. to Recon. at Decl. of Donald Okimoto at ¶ 2.)

The United States was aware of the problem and apparently attempted to resolve the situation by administratively settling the delinquent promissory notes and foreclosures. The United States and the Keanu Defendants attempted to find a purchaser for the subject property without success. (Id. at ¶ 3.)

On October 16, 1989, the United States exercised its option under the promissory note and mortgage and issued a loan acceleration notice to the Keanu Defendants. (See Pl.'s Memo. in Opp. to Recon. at Exh. A.) Even after accelerating the loan, the United States continued to attempt settlement with the Keanu Defendants. (See Pl.'s Memo. in Opp. to Recon. at Decl. of Donald Okimoto at ¶ 4.)

On October 13, 1995 the United States filed the present action against the Keanu Defendants seeking foreclosure and a deficiency judgment. After the filing of the complaint, the parties once again attempted settlement. As part of the settlement process, the time period for filing an answer was extended. The Keanu Defendants filed an Answer to the Complaint on August 16, 1996.

On December 1, 1997, the United States filed its

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[5] Insofar as the Keanu Defendants have characterized the loans as being special loans for Native Hawaiians, the Court notes that the loan program under which the loan was granted is open to all United States citizens. 7 C.R.F. Section 1943.12.

motion for summary judgment and for interlocutory decree of foreclosure. At the hearing on the motion, the Keanu Defendants appeared through counsel, H. K. Bruss Keppeler, and did not object to the United States' Motion. The United States' Motion was granted by Order filed on April 16, 1998.

The Keanu Defendants have now retained an additional attorney, Gary Victor Dubin, who has now filed an opposition to the United States' motion confirming the foreclosure sale and a motion for reconsideration of the April 16, 1998 Order Granting Summary Judgment and an Interlocutory Decree of Foreclosure.

The arguments made in the Keanu Defendants' opposition to the confirmation of sale were based on their assumption that the Court would grant reconsideration and vacate the grant of summary judgment. Since the Court denies reconsideration, there is no need to address the concerns raised in the objections to confirmation of the sale by way of separate order

STANDARD OF REVIEW

The disposition of a motion for reconsideration is within the discretion of the district court and will not be reversed absent an abuse of discretion. Plotkin v. Pacific Tel. & Tel. Co., 688 F.2d 1291, 1292 (9th Cir. 1982) . There is a "compelling interest in the finality of judgments which should not lightly be disregarded." Rodgers v. Watt, 722 F.2d 456, 459 (9th Cir. 1983)

It is well settled in the Ninth Circuit that a successful motion for reconsideration must accomplish two goals. First, a motion for reconsideration must demonstrate some reason why the court should reconsider its prior decision. Second, a motion for reconsideration must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. Stein v. State Farm Mutual Automobile

Ins. Co., 934 F. Supp. 1171, 1173 (9th Cir. 1996) (citations omitted)

DISCUSSION

1. Statute of Limitations

In the present motion, the Keanu Defendants argue that the Court erred by not applying the state of Hawaii law on statute of limitations and that this resulted in manifest injustice to the Defendants.

An action by the United States for foreclosure of a mortgage issued by FmHA is governed by federal law. See United States v. Thornburg, 82 F.3d 886 (9th Cir. 1996); United States v. Dos Canezas Corp., 995 F.2d 1486 (9th Cir. 1993).

When the United States is pursuing foreclosure and wishes to obtain a deficiency judgment, the foreclosure itself is not subject to a limitations period. Dos Canezas, 995 F.2d at 1489. 28 U.S.C. § 2415(c). The underlying action for a money judgment, however, is subject to a six—year statute of limitations. 28 U.S.C.§ 2415(a); Dos Canezas, 995 F.2d at 1489.

As to the accrual date for installments defaulted on, each payment defaulted accrues as of the date of default but the future payments accrue as of the date of acceleration. Dos Canezas, 995 F.2d at 1490 (quoting 54 C.J.S. Limitations of Actions § 153).

The Keanu Defendants argue that foreclosure and sale were barred by Hawaii law. They are in error. The United States is not subject to any statute of limitations period in a foreclosure action other than the six-year limitation on obtaining a deficiency judgment. See Thornburg, 82 F.3d at 889-90.

In any event, the application of the statute of limitations to the underlying cause of action for a deficiency judgment is moot. At the hearing for confirmation, the United States waived its right to a deficiency judgment.

2. Inability to Defend

Second, the Keanu Defendants argue that the grant of summary judgment and foreclosure was, in essence, a default judgment since they failed to raise any defenses or file an Answer to the United States' Complaint. The Keanu Defendants allege that they believed any applicable defenses were barred by the statute of limitation period and they consciously did not raise any defense. This is unsupported by the record in this case as the Keanu Defendants did in fact file an Answer, prepared by counsel H. K. Bruss Keppeler, on August 16, 1996. In their Answer they asserted several affirmative defenses.

3. Allegations of Fraud and Misrepresentation

The allegations of fraud and misrepresentations contained in the Keanu Defendants' third and fourth reasons for bringing their motion for reconsideration under Federal Rule of Civil Procedure 60(b) (3) are without support in the record. The Keanu Defendants presented their defenses to the Court in their Answer to the Complaint, after being allowed an extension of time by the United States for the filing of their Answer.

CONCLUSION

For the foregoing reasons the Court DENIES the Keanu Defendants' motion for relief pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, March 17, 1999.

/s/ Helen Gillmor

HELEN C. GILLMOR
United States District Court Judge